REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 57 of 2005

JOSEPH NJOGU KIMOTHO .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court

at Nanyuki in Criminal Case No. 527 of 2004 dated 10th day of February 2005 by P. C.

Tororey – SRM)

J U D G M E N T

The appellant, **Joseph Njogu Kimotho** was arraigned before the Senior Resident Magistrate's Court at Nanyuki (**P. C. Tororey SRM presiding**) on one count of Robbery with violence contrary to section 296 (2) of the Penal Code. He pleaded not guilty to the charge and faced the trial. A total of five witnesses were availed by the prosecution in support of the charge. Having heard the witnesses and the unsworn statement of defence by the appellant, the learned magistrate believed the prosecution case. Accordingly she convicted the appellant and thereupon sentenced him to death as required by the law.

The appellant was aggrieved by the conviction and sentence. Hence he preferred this appeal. In his "**amended memorandum grounds (sic) of appeal,"** it should actually have been "**Amended Petition of appeal",** the appellant faults the learned magistrate for convicting and sentencing him on the following grounds; insufficient evidence, doubtful evidence of identification and or recognition, failure to conduct the identification parade in accordance with the law, judgment not crafted in accordance with section 169 of the Criminal Procedure Code and finally disregarding the appellant's defence without assigning any reasons.

In brief, this is what informed the prosecution case against the appellant. On 18th September 2003 at about 8 p.m., **Lawrence Wamae Gateru**, the complainant (PW1) was in the company of his friend **Joseph Mwalimu Muriuki** (PW3) at Maxoil Petrol Station bus terminus waiting for means of transport to Naromoru. It was then that they were joined by the appellant. The complainant knew the appellant very well from his days in Karatina. He had actually known him for 10 years. They struck a conversation. The appellant told the complainant that he was known to his brother who was an accountant in Karatina town and he was himself also headed to Naromoru. Seeing that the two (PW1 & the appellant) were well known to each other and were travelling to the same destination, PW3 excused himself and went to Aguthi bar. After waiting in vain for the means of transport to Naromoru, the appellant suggested that the two join forces and hire a taxi belonging to his friend ordinarily found at a bar near G.K. Prison. Each would then contribute Kshs.200/=. The complainant bought the idea and they proceeded to the said bar via Aguthi bar. At the Aguthi bar the complainant excused himself and went to the toilet. When done they proceeded to the prison bar to check on the taxi driver. At the said bar, the

appellant engaged some bar patrons in discussions. Later he merged to inform the complainant that the taxi driver had already left for home. He then proposed to the complainant that he could accommodate him overnight at his house. The complainant bought the idea and they proceeded towards the appellant's house. When they got to a dark area the appellant pulled out a pistol and ordered the complainant to lie down. He then proceeded to search his pockets, took his Nokia mobile phone, cash Kshs.440/=, a new padlock and a cap. He then disappeared into the darkness. The complainant got up and rushed to Aguthi bar where PW3 was still having a drink and informed him regarding the incident. Together they went to the prison bar in search of the appellant. They did not find him. The following day the complainant made a report of the robbery to the police.

On 19th March, **P.C. John Mukoma** (PW4) whilst on Patrol duties received information from an informer near Maxoil that a robbery suspect was at KFA. He proceeded to KFA and the informer pointed out to him the suspect. The suspect who turned out to be the appellant was then arrested and handed over to **Corporal Kiriinya** of Nanyuki police station for further investigation. Subsequent thereto an identification parade was conducted by **C.I. Peter Njuguna Mburugu** (PW2) on 1st April 2004 and the complainant as well as PW3 managed to positively identify the appellant as the person who robbed the complainant. The appellant was then charged.

Put on his defence, the appellant in his unsworn statement of defence stated that on 27th March 2003, he had come to Nanyuki town to purchase medicine for his animals. On his way to the stage he was arrested by the police and taken to the police station where he was detained for 3 days. He was then asked whether he was the one who had stolen from one, **Mr. Wamae** and he denied. Later an identification parade was conducted and he was picked out by people he claimed to have seen at the report office. He denied the charge and claimed that the case against him was a frame up.

At the hearing of the appeal, the appellant elected to submit in support of the appeal by way of written submissions. We have carefully read and considered the written submissions. On her part, **Ms Ngalyuka**, learned state counsel in opposing the appeal submitted orally. Counsel submitted that the appellant was positively identified by both PW1 & PW3. He was also picked out in the identification parade by PW1 & PW3 which parade was properly conducted by PW2. Counsel went on to submit that the complainant gave a detailed account as to how he was robbed by the appellant whom he had been with previously and whom he had been seeing in Karatina. To counsel, the issue of mistaken identity does not arise. Accordingly the conviction of the appellant was safe and should not be disturbed.

This being a first appeal; the appellant is entitled to expect that the evidence tendered during the trial as a whole will be submitted to a fresh and exhaustive examination – See **Okeno v/s Republic (1972) E.A. 32**. It is for this reason that we have endeavoured to summarise the salient portions of the prosecution witnesses' evidence and the unsworn statement of the appellant.

The conviction of the appellant was dependent on the evidence of identification, nay, recognition by two witnesses PW1 and PW3 at night. It was actually at about 8 p.m. It has been said that evidence of visual identification in criminal cases can be a source of miscarriage of justice if it is not carefully handled. In the case of **Kiarie v/s Republic (1984) KLR 739**, the court of appeal stated that where the evidence relied on to implicate an accused person is entirely of identification that evidence should be water tight to justify a conviction. In the same case, the court stated that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken.

We may also wish to point out that although recognition is more reliable than identification of a stranger, such evidence of recognition should be tested carefully knowing that mistaken recognition of close relatives and friends are occasionally made. See **Anjononi & Others v/s Republic (1980) KLR 59** and **Wamunga v/s Republic (1989) KLR 424**.

There is no doubt at all that the appellant was well known to PW1. Indeed PW1 testified that he had known the appellant for about 10 years. He even knew appellant's home at Kiathaini. PW3 as well knew the appellant. Under cross-examination by the appellant PW3 stated "**......... I knew you before. I used to see you around ....**" Clearly then this was a case of recognition. Is it possible that the appellant could

have been recognised by mistake? We do not think so. PW1 spent a lot of time with the appellant. He testified thus on the issue "**....... I knew him because I had spent quite sometime with him at the petrol station and also when we ostensibly went in search of the taxi driver. There was light at Maxoil. There was also light at Aguthi where I went to the toilet. There was also light at the prison bar and I saw him clearly ....**" From this evidence it is apparent to us just as it was with the learned magistrate that PW1 spent a lot of time with the appellant moving from one area to another and there was light whenever they went. There was light at Maxoil. There was light at Aguthi bar. There was also light at Prison bar. Much as no inquiries were made by the learned magistrate regarding the source and intensity of light as required, (**See Maitanyi v/s Republic 1986 KLR 198**), we are nonetheless convinced that PW1 was in a position to positively recognise the appellant given the fact that he was a person well known to him and they had spent a lot of time together conversing. We think that the light in all these various places that the appellant and PW1 went to was sufficient to enable PW1 recognise the appellant. After all and as already stated the appellant was a person the complainant was familiar with. As soon as the appellant joined PW1 and PW3 at Maxoil Petrol Station, he struck a conversation with PW1. He told PW1 how he had met PW1's brother who is an accountant in Karatina. He even asked for a cigarette from PW1. It is evident, therefore that the appellant was not a stranger to the appellant.

The evidence of recognition by PW1 received further boost from PW3. PW3 testified that the appellant joined him and PW1 at the bus stage and struck a conversation. He too knew the appellant very well as he had been seeing him around.

It is also instructive that soon after the robbery, PW1 informed PW3 about the incident and the two went looking for the appellant from a place they were to pick a taxi from. Further when PW1 filed the complaint with the police he categorically stated that he had been robbed by a person known to him. The totality of this evidence is that the appellant was positively identified by PW1 and PW3. We do not think that this evidence of recognition can be faulted. We do not think that there is any possibility of mistaken recognition.

We note that the appellant was subjected to an identification parade and was again picked out by PW1 and PW3. However we do not think that an identification parade was really necessary as both PW1 and PW3 all conceded that they had known the appellant previously. To our mind conducting the identification parade was an exercise in futility. The two witnesses having known the appellant previously were bound to recognise him and easily pick him out from the identification parade. To that extend therefore that evidence was worthless and ought to have been disregarded. Even if the said evidence is disregarded, we think that the evidence of recognition adduced by PW1 & 3 was sufficient to find a conviction.

PW1 testified that when robbing him the appellant was armed with a pistol. It happened in a dark area. One then may ask, how was PW1 able to tell that what the appellant was armed with was a pistol? The answer was provided by PW1 whilst under cross-examination by the appellant. He stated thus "**..... you had a pistol which you pulled out of your left inside jacket. I knew it was a pistol because I have seen police carrying them. It was but I was close to you and I could make out it that it was a pistol. One can even walk in the dark and see his way no thought (sic) not clearly ....**" We have no reason to disbelieve this evidence. If PW1 was very close to the appellant as indeed appears to be the case then he could have been able to see that the appellant had a pistol. We do not think that PW1 merely manufactured this story. He had no reason to do so. Going by the evidence on record there would have no reason to so manufacture the story. Going by the evidence on record there would also have been no reason or cause for PW1 to frame the appellant with the case. There is no evidence of any grudge existing between PW1 and the appellant as would have spurred PW1 to frame the appellant with case. We believe the evidence of PW1 that in robbing him the items set out in the charge sheet he was armed with a pistol, a dangerous and offensive weapon at that.

From the charge sheet it appears that the robbery was committed on 18th September 2003. However we note from the evidence of PW1 that the offence was committed on 18th August 2003. We think that this contradiction was due to inadvertent error on the part of the learned magistrate. We have looked at the original record of the trial magistrate with regard to the testimony of PW1 and noted that she recorded

that the offence was committed on 18th August 2003. This cannot be possibly correct as all the evidence tendered talks of the offence having been committed on 18th September 2003. See the evidence of PW3 and PW5. We are therefore persuaded that the offence was committed on the date set out in the charge sheet and not on the date stated by PW1 in his evidence. In any event, we doubt whether that inadvertent was fatal to the prosecution. Certainty it is curable by virtue of section 382 of the Criminal Procedure Code.

The appellant has complained that the judgment of the learned magistrate was not crafted in accordance with section 169 of the Criminal Procedure Code. We suppose that what the appellant is saying is that the learned magistrate did not frame in her judgment issues for determination, the decision thereon and reasons for such decision. We have carefully perused the judgment and although we think that the trial magistrate should have done a better job, we nonetheless are of the opinion that she did in her own way and style capture generally the issues for determination. She appreciated that the case against the appellant turned on the question of recognition. Having evaluated the evidence, the learned magistrate came to the conclusion thus "**......... I find that identification which is paramount in such a case has been proved beyond all reasonable doubt ...."** We have no reason to fault the learned magistrate's conclusion as aforesaid.

How about the appellant's defence. The appellant takes the view that it was rejected by the learned magistrate without assigning any reasons. We think that this accusation is without merit. The appellant's defence dwelt at length on the events of 27th March 2003, his arrest and subsequent treatment by police officers. It did not address the events of 18th September 2003. In rejecting the appellant's defence, the learned magistrate stated that defence did not deal with the events of 18th September 2003. The defence on that score was in our view well rejected.

The upshot of all we have been saying is that the appellant was convicted on sound evidence. The appeal accordingly lacks merit and is dismissed.

Dated and delivered at Nyeri this 7th day of May 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE